UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UTHAIWAN WONG-OPASI, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 99B00052
STATE OF TENNESSEE (GOVERNOR DON SUNDQUIST), TENNESSEE STATE UNIVERSITY, TENNESSEE BOARD OF REGENTS (TBR), ET AL., Respondents.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING STATE OF TENNESSEE'S MOTION TO DISMISS

(*January 11, 2000*)

I. INTRODUCTION

On November 5, 1999, the State of Tennessee (State) filed a Motion to Dismiss in the case of Wong-opasi v. State of Tennessee (Governor Don Sundquist, et al.). The State bases its Motion upon six discrete theories, each of which shall be described below. Most important, for purposes of this Order, is the State's allegation that the Eleventh Amendment to the United States Constitution renders the State immune from suit, thus depriving this court of subject-matter jurisdiction.

For the reasons discussed below, I hold that the State is indeed immune from suit pursuant to the Eleventh Amendment's grant of immunity, and that the Office of the Chief Administrative Hearing Officer (OCAHO) lacks subject-matter jurisdiction to adjudicate the action. Consequently, the State's Motion to Dismiss is granted.

I further note that no motion to dismiss has been filed by or on behalf of the individually-named co-Respondent, Tennessee Governor Don Sundquist. The present Motion to Dismiss was filed by "Respondent, State of Tennessee," rather than by "Respondents, State of Tennessee and Governor Sundquist," and presents no arguments with respect to the liability of Governor Sundquist.

Although authoritative precedent would permit me to dismiss *sua sponte* the Complaint against Governor Sundquist on the ground that he is cloaked in the Eleventh Amendment immunity of the State of Tennessee, I am unable to do so here because the record before me contains insufficient facts upon which to rule-out Governor Sundquist's individual liability under the Ex parte Young exception to Eleventh Amendment immunity. 209 U.S. 123, 158-59 (1908).

II. BACKGROUND AND PROCEDURAL HISTORY

A. NOTE ON CONSOLIDATION

On January 5, 2000, I issued an Order consolidating Complainant's three separate OCAHO Complaints. The first of these three Complaints, filed against Tennessee State University (TSU), was previously identified as OCAHO Case Number 99B00044; the second Complaint, filed against the State of Tennessee and Tennessee Governor Don Sundquist, was previously identified as OCAHO Case Number 99B00052; and the third Complaint, filed against the Tennessee Board of Regents (TBR), was previously identified as OCAHO Case Number 99B00056. In light of the January 5 consolidation, however, all three Complaints are now identified as OCAHO Case Number 99B00052. The present Order addresses only the State's Motion to Dismiss (which was filed prior to the consolidation), and is of no effect with respect to pending Motions to Dismiss filed by TSU or the TBR. Those Motions, although part of the same consolidated case, will be addressed in separate Orders.

B. BACKGROUND OF WONG-OPASI V. STATE OF TENNESSEE (DON SUNDQUIST, GOVERNOR)

On July 21, 1999, Uthaiwan Wong-opasi (Complainant) filed a pro se Complaint with OCAHO alleging that the State had (1) fired her because of her national origin and her citizenship status and (2) retaliated against her because she had filed or planned to file a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) or a complaint with the OCAHO. See Compl. at 4, 5. Counsel for the State, arguing on behalf of both the State and Governor Sundquist, filed its Answer on September 10, 1999. On November 4, 1999, counsel for the State and Governor Sundquist filed a Motion to Dismiss on behalf of the State (but not on behalf of Governor Sundquist) in which it makes six (6) arguments. First and foremost, the State argues that OCAHO lacks subject-matter jurisdiction by virtue of the State's Eleventh Amendment immunity from suit in federal court. See R's Mt. to Dismiss at 3-7. The five other grounds for dismissal raised by the State's Motion are: (1) that OCAHO lacks subject-matter jurisdiction over Complainant's claims of citizenship-status discrimination because Complainant has failed to prove that she is a "protected individual" as required by 8 U.S.C. § 1324b(a)(3)(B), id. at 7-8; (2) that OCAHO lacks subject-matter jurisdiction over Complainant's claims of national origin discrimination because Complainant had already filed charges regarding those claims with the Equal Employment Opportunity Commission (EEOC) at the time she filed her OCAHO Complaint–in violation, presumably, of 8 U.S.C. § 1324b(b)(2), id. at 8-11; (3) that OCAHO lacks subject-matter jurisdiction because Complainant failed to attach a signed OSC Charge to her Complaint in violation of 8 U.S.C.

§ 1324b(b)(1) and, ostensibly, 28 C.F.R. § 68.7(c), id. at 11; (4) that OCAHO lacks subject-matter jurisdiction because Complainant's OSC Charge against the State was untimely filed, id. at 11-12; and (5) that Complainant has failed to state a claim upon which relief can be granted because her Complaint does not state a prima facie case either of discrimination or of retaliation. Id. at 12-13.

According to the certificate of service, the State's Motion to Dismiss was served by first-class mail on Complainant on November 3, 1999. Under 28 C.F.R. § 68.11(b), Complainant had ten (10) days after the date of service to file her response to this motion. However, because the motion was served "by ordinary mail," and because Complainant had the right "to take some action within a prescribed period after the service" of these motions, 28 C.F.R. § 68.8(c)(2) provided Complainant an additional five (5) days in which to file her response. Therefore, Complainant had until November 18, 1999, to file her response to the State's Motion to Dismiss.

On November 18, 1999, Complainant filed a motion for an extension of time in which to file her responses to the State's outstanding motions, including its Motion to Dismiss. C.' Mot. for Extension. Without objection by the State, Complainant's motion for an extension of time was granted on November 23, 1999, subject to a deadline of December 1, 1999. Order Granting C.' Mot. for Extension at 1. On November 19, 1999, I issued an Order scheduling a prehearing conference for December 7, 1999. Notice of Prehearing Conf. at 1. One of the stated purposes of the conference was to discuss Respondents' pending motions, including their Motion to Dismiss. Id.

Complainant failed to file her response to the State's Motion to Dismiss by the December 1 deadline, and also failed to serve the State with a copy of the response by that date. Instead, Complainant served the response upon the State on December 3, 1999, and filed it with the court on December 6, 1999.

Pursuant to my Order of November 19, 1999, a prehearing conference was held on December 7, 1999, in order to discuss certain contested factual issues relevant to the State's Motion to Dismiss. During this conference, the State asserted that I should not accept Complainant's late-filed responses on grounds of prejudice, and I agreed. See Prehearing Conf. Rep. at 3. Shortly thereafter, Complainant began to transgress my verbal instructions regarding proper behavior at the conference. Id. Complainant's misbehavior soon became obstructive to the progress of the conference, and I was compelled, after issuing several verbal warnings, to terminate the prehearing conference prematurely. Id. at 4-5. In framing this Order I have not considered Complainant's written response to the State's Motion to Dismiss, which has been stricken from the record; moreover, Complainant's misbehavior at the conference prevented any oral argument from the parties with respect to that motion. Id. at 3-6.

III. PARTIES

Many of the parties' pleadings before this court, as well as several of this court's Orders, have included a caption that sets forth "State of Tennessee (Gov. Don Sundquist, et al.)" as the Respondents. The use of this designation finds its origin in the Complaint, where Complainant indicates that she was discriminated against by the "State of Tennessee (Gov. Don Sundquist, et al.)."

Compl. at 3. However, for the reasons set forth below the designation "et al." following Governor Sundquist's name is erroneous and should hereafter be abandoned.

According to applicable regulations, complaints filed with OCAHO must state "the names and addresses of the respondents . . . who have been alleged to have committed the violation." See 28 C.F.R. § 68.7(b)(2) (1999). In the State's case, the only persons or entities "named" in the Complaint as "respondents . . . who have been alleged to have committed the violation" are the State and Governor Sundquist. Compl. at 3. At one point the Complaint filed against the State and the Governor refers to several persons other than Governor Sundquist in a manner suggesting that the Complainant regards them as respondents, see Compl. at 5; yet the Complainant neither specifically identifies these persons as respondents nor provides their addresses, as required by the regulation. Instead, Complainant employs the catch-all phrase "et al." (which simply means "and others"). I conclude that Complainant's use of the abbreviation "et al." is invalid because it violates the pleading requirements of 28 C.F.R. § 68.7(b)(2) and provides inadequate notice to unnamed potential respondents. Cf. Torres v. Oakland Scavenger Co., 487 U.S. 312, 317-18 (1988) (holding that the plaintiff-appellants' use of the term "et al." in the caption of a notice of appeal, as well as the plaintiff-appellants' reference to "plaintiffs" in the body of the appeal, was insufficient to preserve issues on appeal for those plaintiff-appellants not specifically listed by name); Minority Employees of Tennessee Dep't. of Employment Security v. Tennessee Dep't. of Employment Security, 901 F.2d 1327, 1330 (6th Cir.) (en banc), cert. denied sub. nom., Davis v. Tennessee Dep't. of Employment Security, 498 U.S. 878 (1990) (same). Consequently, the Complaint in the State's case is limited to claims made against persons or entities actually named as respondents therein–i.e., the State of Tennessee and Governor Sundquist.

IV. STANDARDS GOVERNING MOTIONS TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

The State has moved for dismissal based on both OCAHO's lack of subject-matter jurisdiction and the alleged failure of the Complainant to state a claim upon which relief can be granted. I am bound to consider the motions regarding subject-matter jurisdiction first, since the State's motion to dismiss for failure to state a claim becomes moot if this court lacks subject-matter jurisdiction. See Bell v. Hood, 327 U.S. 678, 682 (1946); see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5A FEDERAL PRACTICE AND PROCEDURE § 1350, at 209-210 (1990). The standards governing motions to dismiss for lack of subject-matter jurisdiction are distinct from those governing motions to dismiss for failure to state a claim, and the two should not be conflated. See WRIGHT & MILLER, § 1350, at 89 (2d ed. Supp. 1998).

The OCAHO Rules of Practice and Procedure, 28 C.F.R. § 68, contain no specific provision authorizing motions to dismiss for lack of subject-matter jurisdiction. The Rules, however, provide that the Federal Rules of Civil Procedure (FED. R. CIV. P.) " may be used as a general guideline in any situation not provided for or controlled by [OCAHO] rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1 (1999). Thus, it is well established that FED. R. CIV. P. 12(h)(3), which compels dismissal of actions "[w]henever it

appears by suggestion of the parties or otherwise that the court lacks jurisdiction over the subject matter," may be "used as a general guideline" when an OCAHO Administrative Law Judge (ALJ) is confronted with a motion challenging OCAHO's subject-matter jurisdiction. See, e.g., Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr., 8 OCAHO (Ref. No. 1015), at 3 (1998), 1998 WL 1085948, at *2 (O.C.A.H.O.); Artioukhine v. Kurani, Inc. d/b/a Pizza Hut, 1998 WL 356926, *3-4 (O.C.A.H.O.); Boyd v. Sherling, 6 OCAHO 1113, 1119 (Ref. No. 916) (1997), 1997 WL 176910, *5 (O.C.A.H.O.); Caspi v. Trigild Corp., 6 OCAHO 957, 960 (Ref. No. 907) (1997), 1997 WL 131354, * 2-3 (O.C.A.H.O.).[1] Because the Complainant's alleged cause of action against the State arose in the State of Tennessee, and because any judicial review will lie with the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit), I shall hereafter follow Sixth Circuit precedent where applicable.

The Sixth Circuit applies different standards of review to "facial" motions to dismiss for lack of subject-matter jurisdiction–i.e., attacks based on the plaintiff's failure to invoke the court's jurisdiction in the complaint, but not challenging the court's legitimate authority to adjudicate the dispute–and "factual" or "speaking" motions to dismiss for lack of subject-matter jurisdiction–i.e., attacks alleging that the court lacks subject-matter jurisdiction in fact, despite the formal sufficiency of the allegations made in the complaint. See Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir.1990); see also WRIGHT & MILLER, § 1350, at 211-12 (1990). In essence, a "facial" motion to dismiss alleges a mere defect in pleading that can be cured if the non-moving party makes appropriate amendments to the complaint. A "factual" motion to dismiss, by contrast, alleges an incurable jurisdictional defect that deprives the court of any authority to adjudicate the dispute.

Here, the State moves to dismiss for lack of subject-matter jurisdiction on both facial and factual grounds. The State's invocation of the Eleventh Amendment challenges this court's subject-matter jurisdiction in fact, despite the formal sufficiency of the allegations made in the Complaint, and therefore constitutes a "factual" challenge to OCAHO's subject-matter jurisdiction. Moreover, the State's assertions (1) that OCAHO is foreclosed from adjudicating Complainant's national origin discrimination claims because EEOC has already asserted jurisdiction over those claims, and (2) that OCAHO's jurisdiction is foreclosed by Complainant's failure to timely file an OSC Charge, are likewise "factual" challenges to OCAHO's subject-matter jurisdiction. Consequently, with respect to these three grounds for dismissal, the State's Motion must be evaluated according to Sixth Circuit

[1] Citations to OCAHO precedents in bound Volumes I and II, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practice Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. Citations to OCAHO precedents in bound Volumes III-VII, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive decision and order reprints within those bound volumes. For OCAHO precedents appearing in bound volumes, pinpoint citations refer to specific pages in those volumes; however, pinpoint citations to OCAHO precedents in as yet unbound Volumes are to pages within the original issuances. Decisions that appear in Volumes I-VII will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I-VII decisions. Unbound decisions that have only been published on Westlaw shall be identified by Westlaw reference number.

standards governing "factual" or "speaking" motions. By contrast, the State's assertions regarding Complainant's failures (1) to prove that she is a "protected individual," and (2) to attach a signed OSC Charge to her OCAHO Complaint, are "facial" attacks alleging curable defects in pleading. These two grounds for dismissal must be evaluated according to Sixth Circuit standards governing "facial" motions to dismiss. The following paragraphs elucidate the content of these twin standards.

A. SIXTH CIRCUIT STANDARDS GOVERNING "FACTUAL" OR "SPEAKING" MOTIONS TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Under Sixth Circuit law, when a trial court reviews a complaint under a factual attack with respect to the court's subject-matter jurisdiction, the court "is not to presume that the factual allegations asserted in the complaint are true." Kroll v. United States, 58 F.3d 1087, 1090 (6th Cir. 1995); Ohio Nat'l Life, 922 F.2d at 325. Rather, "the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." United States v. Ritchie, 15 F.3d 592, 598 (6th Cir.), cert. denied, 513 U.S. 868 (1994); Ohio Nat'l Life, 922 F.2d at 325 (indicating that "a trial court has wide discretion to allow affidavits, documents and even a limited evidentiary hearing to resolve disputed jurisdictional facts."). Moreover, the Complainant bears the burden of proving jurisdiction in order to survive a factual motion to dismiss. Thomson v. Gaskill, 315 U.S. 442, 445 (1942); Jones v. City of Lakeland, 175 F.3d 410, 413 (6th Cir. 1999); Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990); Rogers v. Stratton Industries, Inc., 798 F.2d 913, 915 (6th Cir.1986).

B. SIXTH CIRCUIT STANDARDS GOVERNING "FACIAL" MOTIONS TO DISMISS FOR LACK OF SUBJECT-MATTER JURISDICTION

Under Sixth Circuit law, when a trial court reviews a complaint under a facial attack with respect to the court's subject-matter jurisdiction, "a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss." Ohio Nat'l Life, 922 F.2d at 325. If, under this standard of review, the complainant fails to satisfy his or her initial burden of proof with respect to the court's jurisdiction, the complaint must be dismissed unless the complainant cures the defect in a timely manner.

V. ANALYSIS

A. THE ELEVENTH AMENDMENT

As mentioned previously, the State's first argument in its Motion to Dismiss is that OCAHO lacks subject-matter jurisdiction to adjudicate this action because the State of Tennessee is immune from suit in federal court under the Eleventh Amendment to the United States Constitution. This is a "factual" challenge to OCAHO's subject-matter jurisdiction, in that it alleges that OCAHO lacks jurisdiction in fact to adjudicate the present dispute, regardless of the sufficiency of the jurisdictional allegations made in the complaint. Consequently, according to Sixth Circuit precedents governing "factual" challenges of this sort, I need not presume the truthfulness of Complainant's allegations;

rather, I am "free to weigh the evidence and satisfy [my]self as to the existence of [my] power to hear the case," keeping in mind that the Complainant bears the burden of proof with respect to jurisdiction. Ohio Nat'l Life, 922 F.2d at 325. Applying these standards, I hereby GRANT the State's Motion to Dismiss on the ground that OCAHO lacks subject-matter jurisdiction over the Complaint to the extent that it contains claims against the State. My rationale for this decision is set forth below.

The Eleventh Amendment to the U.S. Constitution states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. By its terms, the Eleventh Amendment refers specifically to suits against a state brought by citizens of other states or nations. Complainant is a citizen of Thailand who has applied for naturalization as a United States citizen. Compl. at 2. As a citizen of a "foreign state," Complainant thus falls within the express proscription of the Eleventh Amendment. However, even if the Complainant becomes a naturalized citizen of the United States during the course of these proceedings, this court's standard of review with respect to the Eleventh Amendment will remain unaltered. The Supreme Court has interpreted the Eleventh Amendment as extending immunity to all suits brought against a state in federal court, regardless of the plaintiff's citizenship status and regardless of whether the suit seeks retrospective monetary relief or prospective equitable relief. Blatchford v. Native Village of Noatak & Circle Village, 501 U.S. 775, 779 (1991) (citing Hans v. Louisiana, 134 U.S. 1 (1890)); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 304 (1990); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 100 (1984) (quoting Employees v. Missouri Dept. of Public Health and Welfare, 411 U.S. 279, 280 (1973)).

The Supreme Court recognizes two limited exceptions to Eleventh Amendment immunity. First, Congress has the power to "abrogate" the states' immunity from suit in federal court. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996); however, the Court has made clear that this power to abrogate may be exercised only under certain very narrow circumstances. Specifically, Seminole Tribe cautions that congressional abrogation of state sovereign immunity shall be effective only if (1) Congress "unequivocally express[es] its intent to abrogate the immunity" in the language of the relevant statute, id. at 55-56, and (2) Congress effects such an abrogation "pursuant to a valid exercise of power." Id. at 55.

In addition to the congressional abrogation power, the Supreme Court acknowledges that a state may waive its Eleventh Amendment immunity and consent to suit in federal court under certain circumstances. Port Authority Trans-Hudson Corp., 495 U.S. at 304; Atascadero State Hospital v. Scanlon, 473 U.S. 234, 241 (1985); Clark v. Barnard, 108 U.S. 436, 447 (1883). Specifically, the Court holds that a State will be deemed to have waived its Eleventh Amendment immunity only "where the waiver is express or the inference of waiver overwhelming." Edelman v. Jordan, 415 U.S. 651, 678 (1974).

Under normal circumstances, an entity seeking immunity under the Eleventh Amendment must submit proof that it is, in fact, a "state entity." Hall v. Medical College of Toledo, 742 F.2d 299 (6th Cir.), cert. denied, 469 U.S. 1113 (1984). Here, however, Complainant has initiated an action, at

least in part, against the State of Tennessee *qua* State of Tennessee. Absent abrogation or waiver, suits brought directly against a State in federal court are strictly forbidden, regardless of the nature of the relief sought. Seminole Tribe, 517 U.S. at 58; Mixon v. State of Ohio, 193 F.3d 389, 397 (6th Cir. 1999). Thus, the State need not adduce specific facts to show that it is a "state entity" entitled to invoke Eleventh Amendment immunity. Accordingly, I now proceed to inquire (1) as to whether Congress abrogated the states' Eleventh Amendment immunity when it enacted 8 U.S.C. § 1324b, and (2) as to whether the State has waived its Eleventh Amendment immunity.

1. Congressional Abrogation

In Seminole Tribe, the Supreme Court declared that "'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" 517 U.S. 44, 55 (1996) (quoting Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989)); see also Coger v. Board of Regents of the State of Tennessee, 154 F.3d 296, 300-01 (6th Cir.), petition for cert. filed, 67 U.S.L.W. 3364 (U.S. Nov. 16, 1998) (No. 98-821). Thus, to be valid, a congressional abrogation of state immunity must appear in the text of the statute that purports to create the specific cause of action at issue; a court may not infer a waiver from non-textual sources, such as the statute's legislative history or its relationship to other statutes. As the Court observed in Dellmuth v. Muth, "[l]egislative history generally will be irrelevant to a judicial inquiry into whether Congress intended to abrogate the Eleventh Amendment. If congressional intent is unmistakably clear in the language of the statute, reliance on committee reports and floor statements will be unnecessary, and if it is not, [the requirement of an unequivocal abrogation] will not be satisfied." 491 U.S. at 228-29; see also United States v. Nordic Village, Inc., 503 U.S. 30, 37 (1992) (holding in the federal sovereign immunity context that "[a]s in the Eleventh Amendment context, the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report.").

The text of 8 U.S.C. § 1324b is silent on the subject of state immunity. Although the provision prohibits a "person or other entity" from engaging in national origin and citizenship status discrimination, the statute does not purport to define the phrase "person or other entity" as including state governmental entities. Such silence by Congress clearly does not constitute the sort of "unequivocal expression" of congressional intent required by Seminole Tribe. Indeed, two years before Seminole Tribe was decided, the U.S. Court of Appeals for the Tenth Circuit held, in the § 1324b context, that "absent textual support, we cannot conclude that Congress intended to abrogate eleventh amendment immunity in the IRCA." Hensel v. Office of the Chief Administrative Hearing Officer, 38 F.3d 505, 508 (10th Cir. 1994). Since the Hensel decision, OCAHO judges have unanimously concluded that states are immune from suit under § 1324b. See, e.g., Elhaj-Chehade v. Univ. of Texas, Southwestern Med. Ctr. at Dallas, 8 OCAHO (Ref. No. 1022), at 6-7 (1999), 1999 WL 545741, *4-5 (O.C.A.H.O.); McNier v. San Francisco State Univ., College of Business, 7 OCAHO 1194, 1200 (Ref. No. 998) (1998), 1998 WL 746018, *3-4 (O.C.A.H.O.); D'Amico v. Erie Community College, 7 OCAHO 430, 436 (Ref. No. 948) (1997), 1997 WL 562107, *4 (O.C.A.H.O.); United States v. New Mexico State Fair, 6 OCAHO 875, 876-77 (Ref. No. 898)

(1996), 1996 WL 776504, *1-2 (O.C.A.H.O.); Kupferberg v. Univ. of Oklahoma Health Sciences Ctr., 4 OCAHO 1056, 1059-61 (Ref. No. 709) (1994), 1994 WL 761187, *2-3 (O.C.A.H.O.). Consequently, Complainant cannot circumvent Tennessee's Eleventh Amendment immunity by invoking congressional abrogation. Moreover, because Congress did not expressly abrogate Tennessee's Eleventh Amendment immunity when it passed § 1324b, Seminole Tribe's second question–whether Congress's abrogation was undertaken "pursuant to a valid exercise of power"–does not arise.

2. Waiver

In light of my conclusion that the language of § 1324b contains no congressional abrogation of Eleventh Amendment immunity, the Complaint will survive the State's Motion to Dismiss, as against the State, only if the Complainant can prove that the State has waived its immunity from suit in federal court. As stated previously, a state will be deemed to have waived its Eleventh Amendment immunity when "the waiver is express or the inference of waiver overwhelming." See Edelman, 415 U.S. at 678; see also O'Hara v. Wigginton, 24 F.3d 823, 826 (6th Cir. 1994). The State's Motion to Dismiss has affirmatively invoked the State's Eleventh Amendment immunity as a grounds for dismissal; therefore, it is impossible to "infer" that the State has waived that immunity. Thus, a waiver of Tennessee's Eleventh Amendment immunity must be found, if at all, in the positive law of the State of Tennessee.

The Constitution of the State of Tennessee declares that "[s]uits may be brought against the State in such manner and in such courts as the Legislature may by law direct." TENN. CONST. art. I, § 17. This constitutional provision has been interpreted by both Tennessee state courts and federal courts within the Sixth Circuit to mean that "no suit against the state may be sustained absent express authorization from the Tennessee Legislature." Woolsey v. Hunt, 932 F.2d 555, 564-65 (6th Cir.), cert. denied, 502 U.S. 867 (1991); see also Fireman's Fund Ins. Co. v. Bell Helicopter Textron, Inc., 667 F. Supp. 583 (E.D. Tenn. 1987); Greenhill v. Carpenter, 718 S.W.2d 268, 270 (Tenn. Ct. App.1986); Brown v. State of Tennessee, 783 S.W.2d 567, 571 (Tenn. Ct. App.1989); Stokes v. University of Tennessee, 737 S.W.2d 545, 546 (Tenn. Ct. App.1987), appeal denied, (Tenn. 1987), cert. denied, 485 U.S. 935 (1988). The language of this constitutional provision draws no distinction between federal-court suits and state-court suits; rather, the provision establishes a general rule that suits, either state or federal, can be initiated against the State only if the Tennessee Legislature enacts affirmative legislation to that effect.

The Tennessee Legislature has enacted no law in which it expressly waives the State's Eleventh Amendment immunity from suit in federal court. Nor has it enacted any statute in which a waiver of Eleventh Amendment immunity is reasonably inferable. Indeed, the contrary is true. The Tennessee Legislature has passed a statute that categorically prohibits even state courts from entertaining suits against the sovereign:

> No court in the state shall have any power, jurisdiction, or authority to entertain any suit against the state, or against any officer of the

> state acting by authority of the state, with a view to reach the state, its treasury, funds, or property, and all such suits shall be dismissed as to the state or such officers, on motion, plea, or demurrer of the law officer of the state, or counsel employed for the state.

TENN. CODE ANN. § 20-13-102(a) (1998).

In a number of cases the Tennessee Legislature has deviated from the hard-and-fast rule articulated in section 20-13-102(a), and granted limited statutory waivers of sovereign immunity for suits in state courts. Of particular relevance to the State's Motion, for example, is the Tennessee Legislature's enactment of the Tennessee Human Rights Act (THRA), a statute (patterned on various federal anti-discrimination laws) that prohibits employment discrimination because of, among other things, national origin. See TENN CODE ANN. § 4-21-401(a)(1) (1998). Section 4-21-102(4) of the THRA defines an "employer" as "the state, or any political or civil subdivision thereof, and persons employing eight (8) or more persons within the state, or any person acting as an agent of an employer, directly or indirectly[.]" See TENN CODE ANN. § 4-21-102(4) (1998) (underscoring added). Moreover, section 4-21-301 creates a cause of action for retaliation very similar to that found under 8 U.S.C. § 1324b(a)(5), and section 4-21-306 sets forth a host of remedies (including back pay and reinstatement) available to successful complainants. Indeed, the THRA even goes so far as to create express authority for the Tennessee Human Rights Commission (THRC) to enter into work-sharing agreements with the EEOC and the U.S. Department of Housing and Urban Development. See TENN CODE ANN. § 4-21-202(6), (8) (1998).

It must be clearly understood, however, that Tennessee's waiver of sovereign immunity with respect to certain suits commenced in state courts is not tantamount to a waiver of Eleventh Amendment immunity from suit in federal court. As the Sixth Circuit has explained on numerous occasions, it is well within a state's power to consent to suit solely in its own courts. See Mixon v. State of Ohio, 193 F.3d 389, 397 (6th Cir. 1999) (holding that "a State may retain Eleventh Amendment immunity from suit in federal court even if it has waived its immunity and consented to be sued in its state courts."); Johns v. Supreme Court of Ohio, 753 F.2d 524, 527 (6th Cir.), cert. denied, 474 U.S. 824 (1985) (holding that "the fact that the state has waived immunity from suit in its own courts is not a waiver of Eleventh Amendment immunity in the federal courts."); State of Ohio v. Madeline Marie Nursing Homes, 694 F.2d 449, 460 (6th Cir.1982) (holding that "where the sovereign consents to be sued in a specially designated court, any resulting waiver is not general but is confined to actions brought in the forum designated."); see also Boyd v. Tennessee State Univ., 848 F. Supp. 111, 114 (M.D. Tenn. 1994) (stating in the THRA context that "evidence of a waiver to the specific claim raised is insufficient; there must as well be a waiver with respect to pursuit of a claim in federal court.").

The THRA places jurisdiction to adjudicate discrimination claims in the hands of either the THRC or the Tennessee Chancery Court. TENN CODE ANN. §§ 4-21-302(a), 4-21-311(a) (1998). As two U.S. District Courts have recognized, "[d]irect pursuit of [a THRA] action in federal district court is not one of the possible avenues. There is no express consent by Tennessee, neither within

the THRA nor elsewhere, to suit in federal court for claims under the THRA." See Boyd, 848 F. Supp. at 114; Stefanovic v. Univ. of Tennessee, 935 F. Supp. 944, 947 (1996) (stating that the court "agrees completely" with the reasoning in Boyd.). Therefore, even if I assume that the State has consented to be sued for national origin discrimination before the THRC or the Tennessee Chancery Court, this does not mean that the State has also consented to be sued in federal court for related, allegedly discriminatory, conduct.

In conclusion, the State is entitled, as a "state entity," to invoke the protection of the Eleventh Amendment. Moreover, Congress has not abrogated the Eleventh Amendment immunity of the states with respect to suits brought under 8 U.S.C. § 1324b; nor has the State expressly or implicitly waived its Eleventh Amendment immunity from suit in federal court. Consequently, the State's Motion to Dismiss is GRANTED and the Complaint is hereby dismissed as against the State of Tennessee.

B. THE OTHER GROUNDS FOR DISMISSAL SET FORTH IN THE STATE'S MOTION TO DISMISS

Because the Eleventh Amendment accords the State of Tennessee immunity from suit in federal court, I need not address the State's four other challenges to OCAHO's subject-matter jurisdiction. Moreover, I may not address the State's motion to dismiss for failure to state a claim, since to do so would be to assert jurisdiction with respect to that issue. See Bell v. Hood, 327 U.S. 678, 681 (1946).

VI. STATUS OF THE COMPLAINT AS AGAINST GOVERNOR SUNDQUIST IN LIGHT OF THIS ORDER

While the State's Motion to Dismiss argues persuasively that the State is immune from suit under the Eleventh Amendment, the Motion never addresses the immunity of individual officers of the State, such as Governor Sundquist. Consequently, this Order is of no effect with respect to Governor Sundquist, who remains a respondent. While Sixth Circuit precedent gives me the authority to address the jurisdictional issue of Eleventh Amendment immunity *sua sponte*, Ritter v. Univ. of Michigan, 851 F.2d 846, 851 (6th Cir. 1988), I am unable to do so in the State's case because the record in that proceeding contains such scanty information regarding Governor Sundquist that I am unable to rule out the possibility that he is individually-liable under the Ex parte Young exception to Eleventh Amendment immunity.

The Supreme Court holds that a state officer such as Governor Sundquist, sued in his official capacity for violation of federal law, is not necessarily entitled to protection under the Eleventh Amendment's grant of state sovereign immunity. Ex parte Young, 209 U.S. 123, 158-59 (1908); Green v. Mansour, 474 U.S. 64, 68 (1985). This Ex parte Young doctrine, "which ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law," constitutes a decidedly narrow exception to the general rule of Eleventh Amendment immunity. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)

(citing Cory v. White, 457 U.S. 85, 90-91 (1982)). To illustrate the narrowness of the Ex parte Young exception, Puerto Rico Aqueduct explains that "[i]t applies only to prospective relief, does not permit judgments against state officers declaring that they violated federal law in the past, and has no application in suits against the States and their agencies, which are barred regardless of the relief sought." 506 U.S. at 146. Moreover, the Ex parte Young Court itself took care to point out that an alleged violation of federal law must in fact be traceable to the conduct of the named officer in order to qualify for the exception: "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." 209 U.S. at 157 (internal citations omitted).

In 1997, the Supreme Court further narrowed the applicability of the Ex parte Young exception in two significant ways. First, the Court held that suits against individual state officers, seeking prospective equitable relief from continuing violations of federal law, are prohibited by the Eleventh Amendment, despite Ex parte Young, if the requested relief intrudes upon the "special sovereignty interests" of the State. Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 276-77 (1997) (holding that petitioner's declaratory judgment action against individual officials of the State of Idaho was barred by the Eleventh Amendment because it was the "functional equivalent" of a quiet title action against the State, thus intruding upon Idaho's sovereign role in regulating public access to waterways); see also MacDonald v. Village of Northport, Michigan, 164 F.3d 964, 972 (6th Cir. 1999) (holding that Coeur d'Alene Tribe barred an otherwise actionable Ex parte Young suit against individual officers of the State of Michigan where the plaintiffs sought a declaration invalidating a right-of-way that provided public access to Lake Michigan).

Second, in concluding that the Ex parte Young rule was of greatest utility in cases "where there is no state forum available to vindicate federal interests," id. at 270, the Coeur d'Alene Tribe Court suggested that the availability of such state remedies may render the Ex parte Young exception inapplicable:

> What is really at stake where a state forum is available is the desire of the litigant to choose a particular forum versus the desire of the State to have the dispute resolved in its own courts. The Eleventh Amendment's background principles of federalism and comity need not be ignored in resolving these conflicting preferences. The Young exception may not be applicable if the suit would 'upset the balance of federal and state interests that it embodies.'

Id. at 277 (citations omitted). Thus, if a federally-protected interest can be adequately vindicated under state law, deference to principles of federalism may render the Ex parte Young exception unavailable to bring the Complainant's case within the jurisdiction of a federal court.

The foregoing discussion establishes that Governor Sundquist's susceptibility to suit under the Ex parte Young exception depends upon the answers to the following five (5) questions: (1) does Complainant seek prospective or retrospective relief from Governor Sundquist?; (2) has Complainant alleged that Governor Sundquist is presently committing a "continuing" violation of federal law, or has she merely alleged past violations?; (3) has Complainant shown some connection between Governor Sundquist's conduct and the allegedly discriminatory or retaliatory acts she complains of?;(4) if the Ex parte Young exception is applicable, should the Complainant's claim against Governor Sundquist nonetheless be prohibited because the requested relief intrudes upon the "special sovereignty interests" of the State of Tennessee?; and (5) if the Ex parte Young exception is applicable, should the Complainant's claim against Governor Sundquist nonetheless be prohibited on the ground that the Complainant has adequate state remedies?

At present, the record before me contains insufficient information to answer any but the first of these five questions. Consequently, I am unable to decide, *sua sponte*, the issue of Governor Sundquist's liability under the Ex parte Young exception. In light of this fact, the Complaint filed by Complainant against the State and Governor Sundquist survives only insofar as it alleges discrimination and retaliation by Governor Sundquist.

This Order does not purport to adjudicate any matter raised in pending Motions to Dismiss filed by Tennessee State University and the Tennessee Board of Regents. As I noted previously, those Motions shall be addressed in separate Orders.

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ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE CONCERNING APPEAL

This is a final order. As provided by 8 U.S.C. § 1324b(i) and 28 C.F.R. § 68.57, not later than sixty (60) days after entry of this final order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of January, 2000, I have served the foregoing Order Granting State of Tennessee's Motion to Dismiss on the following persons at the addresses shown, by first class mail, unless otherwise noted:

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